IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal No. 01-455-A
	)	
ZACARIAS MOUSSAOUI,	)	
Defendant	)	

GOVERNMENT'S MOTION TO SET TRIAL DATE

The United States respectfully requests the Court to set a trial date in this case. The Fourth Circuit's ruling on October 13, 2004, denying defendant's Petition for Rehearing *En Banc,* and the issuance of the mandate on October 21, 2004, returns this case to the Court for trial. Although we understand that the defense intends to petition the Supreme Court for a writ of *certiorari*, that petition will not by itself stay the District Court proceedings, and the defense did not seek a stay of the mandate in the Fourth Circuit pursuant to Fed. R. App. P. 41(d)(2). Moreover, *certiorari* is unlikely at this time, we respectfully suggest, because the Supreme Court can always address the use of substitutions after trial. Indeed, Mr. Dunham has previously agreed with this view.[1] Further, the parties can prepare for trial while the defense seeks *certiorari*. Therefore, there is no reason to delay setting a date for trial.

[1] See 2/5/03 Transcript (docket no. 758) at 21 (Mr. Dunham: "I don't think a petition to the Supreme Court would lie from our side if we lost, because the Supreme Court would probably tell us, you know, bring it up if you get convicted. And so the only likelihood of a cert. petition would be, it seems to me, if the Fourth Circuit were to affirm the Court.").

For these reasons, and in accordance with the Court's Order of November 5, 2003,[2] the Government respectfully requests the Court to set this case for trial to begin with jury selection on April 25, 2005, and opening statements/evidence on Tuesday, May 31, 2005.[3] To aid the Court in scheduling this case for trial, we have set forth below the current status of issues pending before the Court.

Outstanding Non-CIPA Motions

A total of 11 non-CIPA motions that were affected by the appellate litigation will require rulings by the Court.[4] The Government has prepared a chart of the pending motions, which the Government will share with the Court and defense counsel if the Court so desires.[5]

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[2] In this Order (docket no. 1111), the Court ordered "that no trial date will be set sooner than 180 days after the return of the mandate if this case remains a capital prosecution . . . ." Because the mandate was issued on October 21, 2004, the Government's proposed trial date falls after the 180-day minimum. Of course, at the time the Court issued its Order on November 5, 2003, the defense had already worked on this case for nearly two years.

[3] We suggest allotting at least four weeks, instead of two, for jury selection for two reasons. First, due to the amount of publicity associated with this case in the intervening three years, voir dire is very likely to take longer than originally anticipated. Second, last minute, unanticipated CIPA hearings will likely be needed before opening statements, which can be held during any unused time allotted for jury selection. Thus, we suggest beginning on May 31, 2005, the day after Memorial Day. Under the proposed schedule, the trial will conclude before the anniversary of the 9/11 attacks, allaying a concern previously voiced by the defense.

[4] Because the defendant has forfeited his *pro se* rights, we have not included any *pro se* pleadings filed by Moussaoui.

[5] Under the Court's Order of July 23, 2004 (docket no. 1185), the defense was ordered to file a response to docket numbers 93 and 1176, which pertain to the Government's mental health motions, within 10 days of the return of the mandate. Thus, the defendant's response is now due on November 1, 2004.

Outstanding CIPA Motions

Through their Section 5 CIPA filings, the defense has identified 345 classified items that it would like to introduce at trial. Of these 345 items, 236 items have either been declassified or provided in unclassified form (or its equivalent). A chart of these items is attached as Exhibit A.[6] Beyond that, only 109 classified items remain at issue. Charts listing these 109 items, and identifying abbreviations for the Government's objections, are attached as Exhibit B and Exhibit C, respectively.

The remaining 109 classified items include seven items consisting of approximately 11 detainee statements for which substitutions need to be crafted pursuant to the Fourth Circuit's decision in United States v. Moussaoui, 382 F.3d 453 (4th Cir. Sept. 13, 2004). An additional five items involve statements from detainees whom the Court has already found to be immaterial. Ten more items involve statements for detainees not yet addressed by the Court. Thus, there are approximately 83 classified items not involving detainees that will be the subject of CIPA litigation. For these 83 classified items, we believe that the CIPA hearing will last no longer than approximately four days, following an appropriate briefing schedule.[7]

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[6] The attached charts are classified "secret." This motion, separated from the attachments is unclassified.

[7] The number may be slightly smaller than 83 because a number of items appear to be duplicate versions of the same document and a number of items appear to be designations of superseding versions of a cumulative document of which the defense may only wish to use the latest version. In addition, we are making inquiries whether, in light of the passage of time and the declassification of information for other reasons such as the 9/11 Commission, additional documents might now be declassified.

Classified Discovery

The Government has continued to produce discovery during the various appeals in this case. Through our recent Section 4 filings, we have produced summaries of the relevant detainees' statements that are current as of August 9, 2004. We are in the process of updating all discovery from the relevant agencies and anticipate completion of that production by the first half of December 2004.[8]

Depositions of Foreign Witnesses

The Government anticipates the need to take depositions of five or fewer foreign witnesses.

Closed Circuit Television for the Victims

By letter dated March 11, 2003, the Court selected federal courthouses in the District of Columbia, Manhattan, Long Island, and Newark, New Jersey, as transmission sites for Closed Circuit Television (CCTV) for the victims. The Court has indicated that it may revisit the issue and add transmission sites in other locations. The Government urges the Court to reconsider and to add sites in Boston, Los Angeles, and Philadelphia. Victims of the 9/11 attacks have consistently expressed to the Government their desire for CCTV sites in these cities. This is particularly true for New England residents.

Additionally, pursuant to the Court's Order dated March 11, 2002 (docket no. 786), it will

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[8] The extent of classified discovery is influenced by the "equally culpable mitigating factor" set forth in 18 U.S.C. § 3592(a)(4). We intend to confer with defense counsel to see whether we can agree on the persons to whom this mitigating factor may apply. If we cannot agree, we intend to litigate the issue. To date, we have produced discovery consistent with our view of the persons for whom we believe that this mitigating factor may apply.

be necessary for the Court to review approximately 300 CCTV applications and rule upon their eligibility. If the Court allows additional sites, the victims will need to be advised of the additional sites and given an opportunity to file the appropriate application to view the trial proceedings. Thereafter, the applications will need to be evaluated. We anticipate that the process of notifying the victims of additional sites and then receiving and evaluating the applications will take approximately four months.

Stipulations

Finally, we ask the Court to address whether defense counsel has authority to enter into evidentiary trial stipulations over the defendant's objection. Although the defendant has made clear during earlier hearings that he wishes to contest every fact, the law is clear that defense counsel has such authority, and we believe that a ruling on this point will help both parties prepare for trial and ultimately streamline the proceeding substantially.

It is well settled that counsel may enter into evidentiary trial stipulations, over its client's objection, so long as the decision to do so comports with constitutionally guaranteed effective assistance of counsel. To this end, courts have distinguished between litigation decisions that affect a defendant's fundamental rights and decisions that are merely trial tactics. Decisions in the former category are personal to the defendant and, as a result, require his or her express consent. Tactical decisions, on the other hand, may be decided by counsel without the defendant's consent. Brown v. Artuz, 124 F.3d 73, 77 (2d Cir. 1997) (citing United States v. Teague, 953 F.2d 1525, 1531 (11th Cir. 1992) (*en banc*)). The Supreme Court has held that decisions about what evidence to present and what witnesses to call are matters of trial tactics,

which may be made by trial counsel without consultation or an express waiver by the defendant. New York v. Hill, 528 U.S. 110, 115 (2000). In the same vein, the Fourth Circuit has held: "Decisions that may be made without the defendant's consent 'primarily involve trial strategy and tactics,' such as 'what evidence should be introduced, what stipulations should be made, what objections should be raised, and what pre-trial motions should be filed.'" Sexton v. French, 163 F.3d 874, 885 (4th Cir. 1998) (quoting Teague, 953 F.2d at 1531). Counsel is the ultimate decision-maker on questions concerning the admission of evidence and, therefore, may enter into factually accurate evidentiary stipulations, even against the client's wishes. See New York v. Hill, 528 U.S. at 115 ("Absent a demonstration of ineffectiveness, counsel's word on such matters is the last"); see also United States v. Wingate, 128 F.3d 1157, 1161 (7th Cir. 1997); United States v. McGill, 11 F.3d 223, 227 (1st Cir. 1993); United States v. Kiser, 948 F.2d 418, 425 (8th Cir. 1991); Paschal v. United States, 2003 WL 22462555 at *4 (N.D. Ill. 2003); United States v. Boykin, 2000 WL 206788 at *2 (S.D. Ala. 2000); United States v. Bastidas, 28 F. Supp. 2d 1346, 1352 (M.D. Fla. 1998); United States v. Jamal, 1998 WL 164866 at *3 (N.D. Ill. 1998).

There are many facts in this case that are not disputed and for which a stipulation would not undercut Moussaoui's defense that he was "not 9/11." For example, we believe that the defense has no quarrel with the facts regarding the travel of the hijackers. Instead of spending countless hours during trial introducing business records to prove the hijackers' travel, this evidence could be easily proved by stipulation. We, of course, would be willing to enter into stipulations that the defense proposes where we have no factual or legal objections. Such stipulations would save many trial days without undercutting Moussaoui's defense. Indeed,

defense counsel may be ineffective by not engaging in stipulations rather than exercise their professional judgment and enter into stipulations which strategically aid the defense. McGill, 11 F.3d at 227. Thus, we ask the Court to rule that defense counsel may enter into stipulations at trial.

Respectfully submitted,

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Certificate of Service

I certify that on the 27th day of October 2004, a copy of the foregoing Government's Motion was provided to the following via the Court Security Officer:

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